INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	4
Argument	9
Conclusion	11

CITATIONS

Cases:

Achilli v. *United States*, 353 U. S. 373	10
Andrews v. *United States*, 157 F. 2d 723	9
Harris v. *United States*, 169 F. 2d 887, certiorari denied, 335 U. S. 872	9
Harvey v. *United States*, 215 F. 2d 330	9
Stanley v. *United States*, 245 F. 2d 427	9
United States v. *Adonis*, 221 F. 2d 717	9
United States v. *Graham*, 102 F. 2d 436, certiorari denied, 307 U. S. 643	9
United States v. *Werner*, 160 F. 2d 438	9
Wilson v. *United States*, 162 U. S. 613	9

Statutes:

Internal Revenue Code of 1939:	
Sec. 894(b)(2)(C) (26 U.S.C. 1952 ed., Sec. 894(b)(2)(C))	2, 4
Sec. 3616(a) (26 U.S.C. 1952 ed., Sec. 3616(a))	3, 10
Internal Revenue Code of 1954, Sec. 7207 (26 U.S.C. 1952 ed., Supp. V, Sec. 7207)	3, 4, 10

Miscellaneous:

II Wigmore, *Evidence* (3d ed.) § 278	9

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 100

HARRY J. ALKER, JR., PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. A3-A7) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1958 (Pet. A8), and the petition for a writ of certiorari was filed on June 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner was convicted on all counts of a three-count indictment alleging that he had (1) wilfully at-

tempted to evade and defeat a large part of the federal estate tax imposed upon the Estate of Winfred S. Hurst by filing a false estate tax return in 1951, understating the decedent's cash on hand; (2) wilfully delivered to the Treasury Department on April 7, 1955, certain documents which he knew to be false, fraudulent and forged, concerning the ownership of cash by Hurst at the time of his death; and (3) wilfully delivered to the Treasury Department on April 29, 1955, certain documents which he knew to be false, fraudulent and forged, concerning the assets of Hurst. On appeal, with the consent of the Government, the Court of Appeals dismissed Counts 2 and 3, vacated the sentences on those counts, and affirmed the conviction on Count 1.

The question presented is whether petitioner is entitled to a new trial on Count 1 by reason of the dismissal of Counts 2 and 3.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 894. PENALTIES

* * * * *

(b)(2)(C) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and,

upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 894.)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False returns.* Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 3616(a).)

Internal Revenue Code of 1954:

SEC. 7207. FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(26 U.S.C. 1952 ed., Supp. V, Sec. 7207.)

STATEMENT

On March 8, 1956, two indictments were filed against petitioner in the United States District Court for the Eastern District of Pennsylvania. (R. 1a, 3a-4a.) The first, which charged him with conspiracy, was dismissed at the close of all the evidence. (R. 248a.) The second indictment charged that petitioner had (1) wilfully attempted to evade and defeat a large part of the federal estate tax imposed upon the Estate of Winfred S. Hurst by filing a false estate tax return in February, 1951, understating the decedent's cash on hand; (2) wilfully delivered to the Treasury Department on April 7, 1955, certain documents which he knew to be false, fraudulent and forged, concerning the ownership of cash by Hurst at the time of his death; and (3) wilfully delivered and caused to be delivered to the Treasury Department on April 29, 1955, certain documents which he knew to be false, fraudulent and forged, concerning the assets of Hurst. (R. 1a, 3a-4a.)[1] Count 1 alleged a violation of Section 894(b)(2)(C) of the Internal Revenue Code of 1939; Counts 2 and 3, Section 7207 of the Internal Revenue Code of 1954. (R. 3a-4a.)

After a jury trial petitioner was found guilty on all three counts. (R. 300a.) On September 19, 1957, he was sentenced to six months imprisonment on each count, the sentences to run concurrently, and fined $8,000 on Count 1, $1,000 on Count 2 and $1,000 on Count 3. (R. 2a, 301a.) In its brief in the Court of Appeals, the Government stated (p. 3) that it did "not

[1] The record filed in this Court consists of (1) the one-volume appellant's appendix in the Court of Appeals, with pages numbered from 1a to 308a; (2) the one-volume appellee's appendix in the Court of Appeals, with pages numbered 1b to 23b; and (3) the exhibits introduced into evidence by the Government.

desire to take any position regarding the conviction on Counts 2 and 3. Accordingly it is agreeable to the United States that Counts 2 and 3 be dismissed or dropped from the case and the sentences thereon vacated." The Court of Appeals affirmed the conviction on Count 1 and dismissed Counts 2 and 3. (Pet. A7.)

The evidence to support the verdict, the sufficiency of which is not challenged, may be summarized briefly as follows:

Petitioner is a practicing attorney in Philadelphia, experienced in estate tax matters. (R. 25a, 122a.) Winfred S. Hurst, a Philadelphia certified public accountant, died on November 7, 1949, naming petitioner the executor of his will. (R. 8a-9a, 2b.) Petitioner probated Hurst's will on November 12, 1949 (R. 8a), prepared the federal estate tax return, and filed it on February 5, 1951 (R. 10a, 12a; Govt. Ex. 2). In executing this return, petitioner stated that it listed, to the best of his knowledge and belief, all of the property constituting the gross estate of Hurst. (R. 11a, 12a-13a.) Reported on the return was a total gross estate of $629,079.80, including "cash on hand belonging to decedent", $3,046.93 (R. 17a; Govt. Ex. 2, Schedule C); and a net estate of $386,885.75 (R. 15a, 17a).

Hurst had died suddenly of a cerebral hemorrhage. (R. 8b-9b; Govt. Ex. 2.) The morning after his death there were present in Hurst's office petitioner, Mrs. Clara Roth and her daughter, close friends of Hurst, one Carpenter, an employee of Hurst, and another person. (R. 26a, 47a, 68a, 2b-3b.) In the presence of the others, petitioner removed seven packages of currency from Hurst's safe and placed them in a black

brief case. (R. 27a-29a.) Petitioner remarked that each of the seven packs—which were wrapped in paper bands—contained $500, but Carpenter corrected him, stating that each pack contained $5,000. Petitioner made no reply. (R. 34a, 35a-36a, 52a, 53a, 22b-23b.) Petitioner put the money in his brief case and left with it, taking it to his own office. (R. 40a, 53a-54a, 64a-65a, 23b.) The estate tax return, filed in 1951, omitted this $35,000, which omission resulted in a tax deficiency of $9,904.91. (R. 65a, 75a; Govt. Ex. 2, Schedule C.)

In the summer of 1952, petitioner and Carpenter had two conferences with a Treasury agent named Gurbarg. On the first of these occasions Carpenter, who was then working for petitioner on the Hurst estate, stated that there had been $30,000 in Hurst's safe at the time of his death; that with it there had been a note or an envelope on which was written the name of a revenue agent named Rothman; that shortly afterward Carpenter told petitioner that Rothman wanted the money, whereupon petitioner removed it from his safe and gave it to Carpenter, who delivered it to Rothman; that he had obtained no receipt; that Rothman had since died; and that Carpenter thought it was "money that they were using to bet on the horses, gambling". (R. 64a-67a, 95a.) Petitioner stated "I had nothing to do with it", though he did not dispute Carpenter's version of the facts. (R. 86a-87a; 108a-109a.) At the second conference in the summer of 1952, Carpenter gave substantially the same testimony, except that he stated, in petitioner's presence, that he had always felt that the $30,000 paid to the deceased agent represented bribe money. (R. 68a-69a, 97a.)

On January 11, 1954, petitioner wrote a letter to Agent Gurbarg advising him that Carpenter had stated

to petitioner that the $35,000 in Hurst's safe belonged not to Hurst but to four named companies which had been clients of Hurst. (R. 72a-73a.) Petitioner explained that he had excluded the $35,000 from the estate tax return because he "did not regard them as Mr. Hurst's moneys * * *" (R. 73a.) This explanation was entirely false. (R. 15a-17a, 48a-49a, 60a-61a, 114a-115a, 272a, 18b-20b; Govt. Ex. 2, Schedules F and K; Govt. Ex. 4.) Notwithstanding its falsity, petitioner advanced the same version of the facts in a petition filed in the Tax Court on March 23, 1954. (R. 119a-121a; Govt. Ex. 6, p. 3.) In that document, petitioner stated that the $35,000 "was in decedent's office in various envelopes, marked the property of" the four named firms; and that "The cash was delivered to the owners or their nominee." (Govt. Ex. 6, p. 3.)

Still later, petitioner gave another explanation of the ownership and disposition of the funds. At a conference with officials of the Internal Revenue Service on April 7, 1955, petitioner stated that there had been a cash fund of $30,500 in the estate; that $11,250 had been paid by petitioner to one Pullinger, a former assistant of Hurst, for distribution to two other persons to whom Hurst had owed money; that $9,000 had been paid to Rothman, the deceased revenue agent; and that petitioner was restoring to the estate some $16,000 out of his own pocket. (R. 121a, 132a-134a, 144a-146a.) To substantiate his story, petitioner presented two alleged receipts from Pullinger (R. 133a; Govt. Ex. 11) and three undated memoranda purportedly signed by Hurst, authorizing the distributions to Pullinger and Rothman (R. 124a-128a, 135a-136a; Govt. Exs. 7, 8 and 9). This explanation was false and several of the documents submitted by petitioner were forgeries. (R. 17a, 168a,

270a, 272a, 280a, 16b; Govt. Ex. 2, Schedule K, Govt. Exs. 16 and 17; Pet. 11.)

On April 29, 1955, there was presented to the Internal Revenue Service a group of schedules and statements prepared by a firm of certified public accountants from information furnished by petitioner, accompanied by petitioner's affidavit asserting the truth of the facts set forth. (R. 131a, 139a, 142a, 161a-163a; Govt. Ex. 15.) Included was an affidavit by Carpenter stating that when Hurst died his office safe contained $30,500 in cash. (R. 142a; Govt. Ex. 15, Schedule A-4(2).) The allegations as to the disposition of this cash were in general accordance with those made at the conference held three weeks earlier, and were supported by the same forged documents petitioner had then presented. (R. 139a-144a; Govt. Ex. 15, Schedules A-4(4), A-4(6) and A-4(7).)

Petitioner, testifying in his own defense at the trial, denied that he had seen any cash in Hurst's safe and accused five Government witnesses of not telling the truth. (R. 174a-175a, 16b-18b.)[2]

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[2] The defense also advanced the contention that any omission of cash from the estate tax return was more than offset by the alleged overvaluation of 1,300 shares of stock in the Dublin Hosiery Company. This stock had been reported by petitioner at a value of $100 per share. Several months before Hurst's death a large block of it had been sold by another estate for $66.67 per share. (R. 155a-156a, 167a, 171a-172a, 203a-206a.) Petitioner knew about this sale at the time, having negotiated it himself as counsel for the corporation and a member of the board of directors, but testified that he had forgotten about it. (R. 172a-177a, 204a-207a.) The trial judge instructed the jury that they must acquit petitioner on Count 1 unless they were convinced beyond a reasonable doubt that the value of the Dublin stock was in excess of $66.67 per share. (R. 273a-275a.)

ARGUMENT

Petitioner contends (Pet. 11-16) that his defense to the first count of the indictment was prejudiced by evidence, admitted under the second and third counts, that petitioner had submitted forged documents to the Treasury Department; that the latter counts are invalid on their face; and that evidence admitted under them would have been admissible under Count 1 only "to the extent that it bore on the issue of the net amount of the decedent's estate" (Pet. 13). The argument is without merit. It is clear that the evidence complained of would have been admissible under the first count even if it had stood alone. Count 1 alleged that petitioner had wilfully attempted to evade a large part of the tax on Hurst's estate by filing a false return *improperly* omitting $35,000 of cash on hand. (R. 3a.) The forged documents submitted by petitioner to the Internal Revenue Service four years later were plainly designed to substantiate petitioner's false contention that any cash found in Hurst's safe after his death belonged to persons other than Hurst and hence was *properly* excluded by petitioner from the estate tax return. (*Supra*, pp. 7-8.) It is well settled that fabrication of evidence of innocence is cogent evidence of guilt. *Wilson* v. *United States*, 162 U.S. 613, 620-621; *Harris* v. *United States*, 169 F. 2d 887 (C.A. D.C.), certiorari denied, 335 U.S. 872; *United States* v. *Werner*, 160 F. 2d 438, 441 (C.A. 2d); *Stanley* v. *United States*, 245 F. 2d 427, 433 (C.A. 6th); *Harvey* v. *United States*, 215 F. 2d 330, 332 (C.A. D.C.); *Andrews* v. *United States*, 157 F. 2d 723, 724 (C.A. 5th) and cases cited; *United States* v. *Graham*, 102 F. 2d 436, 442-443 (C.A. 2d), certiorari denied, 307 U.S. 643; II Wigmore, *Evidence* (3d ed.) § 278; Cf. *United States* v. *Adonis*, 221 F. 2d 717, 719-720 (C.A.

3d). It follows that the evidence of petitioner's submission to the Internal Revenue Service in 1955 of false exculpatory explanations, supported by forged documents, clearly would have been admissible under the first count even if that count had stood alone, just as the evidence of petitioner's false explanations in 1954 (*supra*, pp. 6-7) was admissible.[3]

Petitioner also makes the contention (Pet. 13-15) that Counts 2 and 3 are invalid on their face. These counts were dismissed on appeal on the Government's suggestion because of doubts concerning the proper application of Section 7207 of the Internal Revenue Code of 1954, following *Achilli* v. *United States*, 353 U.S. 373.[4] The Government is considering clarifying legislation. In view of the action taken by the court below, there is no occasion, under the circumstances of this case, for the Court to reach that question.

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[3] Petitioner recognizes the close relationship among the three counts: "* * * of course if the documents alleged in Counts 2 and 3 to have been forgeries were in fact genuine, then to that extent petitioner did not attempt to defeat and evade his decedent's estate tax as Count 1 alleged that he did." (Pet. 12.)

[4] The *Achilli* case, decided two months after the trial of petitioner began, held that Section 3616(a) of the Internal Revenue Code of 1939, the predecessor of Section 7207 of the Internal Revenue Code of 1954, does not apply to income tax violations.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1958.

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